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No. 751

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL.,

Appellants,

VS.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,

Appellees.

REPLY TO MOTION TO AFFIRM

While the motion to affirm by appellees Burlington et al. fails almost entirely to meet the points stated in our jurisdictional statement (J.St.) and that of the Government in No. 752, certain assertions made in that motion (cited hereafter as "M.A. . .") require this brief reply.

1. APPELLEES CANNOT CONVERT THIS CASE INTO A QUESTION OF FACTUAL NOTICE.

Attempting to obscure this novel construction of the Administrative Procedure Act, appellees make an elaborate effort to convert this case into an unappealing factual controversy by arguing that "[t]he sole question decided by the court below was whether or not notice was given." (M.A. p. 5.) But the district court, in its discussion of Section 4(a) of the Administrative Procedure Act (J.St. App. A-5) holds that, the statute notwithstanding, "[t]hese [appellees] were entitled to clear, decisive notice of the Commission's contemplated enlargement of the issues . . .," notice which the court held could not be ascribed to them though they were all present and participated in all five

complaint cases (*ibid*). Thus the three-judge court was required to construe Section 4(a) contrary to its plain language in order to set aside the I.C.C. order subject of this appeal.

The explicit language of Section 4(a) and its unambiguous legislative history (J.St. 11-13), which appellees do not dispute, required no additional notice of rule-making[1] to change rates where the carriers involved were already named parties to a proceeding where those rates were in controversy. The plain fact is that Section 4(a)[2] says specifically that the actual notice given here is sufficient. Still the court below found this notice not sufficient, holding that in addition appellees "were entitled to clear, decisive notice," presumably by publication in the Federal Register, since it relies upon Section 4(a). While the three-judge court

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1. We concede that the lower court correctly construed I.C.C.'s order vacating the mandatory aspect of rate-break to be rule-making. There is no question here that such rule-making was a completely proper way for the Commission to dispose of the case. *Securities & Exch. Comm'n.* v. *Chenery Co.*, 332 U.S. 194 at 202-203.

2. Section 4 provides:

"(a) NOTICE.—General notice of proposed rule-making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

(J.St. App. A at A-5 to A-6) purports to overturn the Commission upon its construction of Section 4(a), it imputes to the statute elements never enacted by the Congress.

2. APPELLEES' OTHER PROCEDURAL ARGUMENTS REST UPON FALLACIOUS FACTUAL ASSERTIONS.

A. The Commission Conformed Completely To Its Prior Practice In These Cases, And Stayed Strictly Within The Geographic Scope Of The Complaints.

Appellees can point to *no* case (M.A. at 16-17) where the Commission, in over twenty years of administering the rate-break rule, has noticed up proposed rule-making in order to modify the rule other than the single case[3] where the rule was not then presently subject of a complaint by shippers, a situation unlike this proceeding. Their theme, as brought out by the *Nebraska-Colorado* case,[4] returns inevitably to the contention, which the district court found persuasive (J.St. App. A-2 to A-4), that vacation of the mandatory aspect of the rule "not only as to the limited area covered by the five complaints but also throughout the entire Western district[,]" somehow enlarged the scope of the cases and unfairly surprised appellees. To lay to rest once and for all any such argument, on the page following we set out a true copy of Exhibit 119-A-1 from the record, showing in black and white print (as it was received in evidence before the Commission) the rate-break structure

3. *Grain and Grain Products*, 298 I.C.C. 261, cited at M.A. p. 17, note 22.

4. *Nebraska-Colorado Grain Producers Ass'n.* v. *C.B. & Q. R.R.*, 243 I.C.C. 309, cited at M.A. p. 17, note 22.

of gathering and intermarket proportional rates,[5] as well as rate-break markets[6] and the major rail gateways for grain. Added to Ex. 119-A-1 by the red overlay are the rate-break rates and routes which were attacked in the consolidated complaints. Each rate and route is cited in specific detail to the complaints (listed in Appendix A to this Reply Brief) placing it in issue. Even the most casual inspection of this exhibit illustrates that rate-break rates and routes to, from or through *every* rate-break market throughout the Western district were indisputably in issue, and that the Commission in vacating mandatory compliance with the rule throughout the Western district stayed strictly within the geographic bounds of the controversy.

B. The Examiner Did Not And Could Not Limit Issues To Be Considered By The Commission.

Next, appellees Burlington et al. assert (at M.A. pp. 13-14) that the Commission's hearing examiner somehow "limited issues raised by complainants," to less than the lawfulness of the rate-break rule generally and confining the case to "a 'small but important segment of the traffic'" (M.A. at p. 13).[7] As we pointed out, however, the rate-break rule was in issue generally under the literal language of the complaints,[8] an understanding confirmed by all

5. The structure is explained at J.St. App. C, pp. 747-751, and in Ex. 119 at pp. 1-4.

6. The rate-break or primary markets shown are indicated by gray shading which was not done on the original of Ex. 119-A-1, and the omission of complainants Atchison and Leavenworth, Kansas, and St. Joseph, Missouri, conforms to the Commission's practice (J.St. App. C at 744) of using Kansas City, Mo.-Kan., as representative of all four markets.

7. This contention, too, seemed persuasive to the three-judge court (J.St. App. A-4).

8. See note 6 on page 6 of the Commission's Jurisdictional Statement in No. 752.

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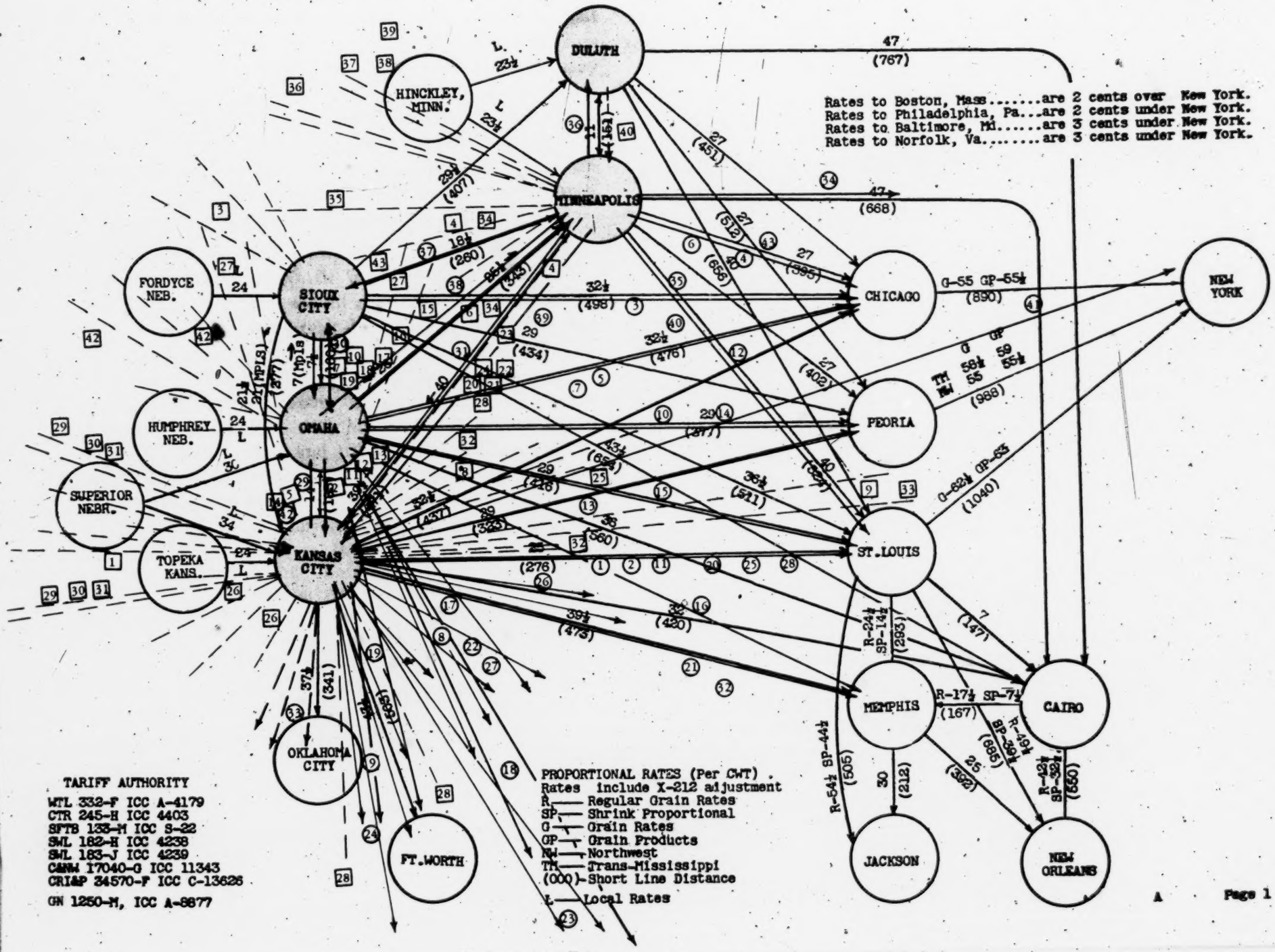

TARIFF AUTHORITY

WTL 332-F ICC A-4179
CTR 245-H ICC 4403
SFTS 133-M ICC S-22
SWL 182-H ICC 4238
SWL 183-J ICC 4239
C&NW 17040-G ICC 11343
CRI&P 34570-F ICC C-13626
GN 1250-M, ICC A-8877

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parties (J.St. p. 7) and the Examiner.[9] Section 8(a) of the Administrative Procedure Act[10] categorically provides that "On . . . review of the initial decisions of [hearing] officers the agency shall, except as *it* [emphasis supplied] may limit the issues by notice or rule, have all the powers which it would have in making the initial decision." As this Court ruled in *F.C.C.* v. *Allentown Broadcasting Co.*, 349 U.S. 358 at 364, under such statutes the agency itself has the power of ruling on facts and policies in the first instance, a ruling wholly hostile to appellees' assertion here.

Appellees apparently attach considerable significance to the fact that both North Western[11] and Secretary of Agriculture Freeman[12] sought specifically (and unsuccessfully) to raise the rate-break docket generally in the case. Appellees argue (M.A. at p. 20) that "the Commission had ruled out . . . the very issues on which it undertook action."[13] But appellees were present when the witness for North Western introduced Ex. 130, his testimony asking specifically (Ex. 130, pages 5 and 10) that the Commission "require the vacation of the outstanding orders in connection with Docket 17000 Part 7 . . .," and they raised no objection (R. 1250) to this testimony. It has long been the law, codi-

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9. At the Prehearing Conference the examiner stated (Prehearing R. 16) without contradiction his understanding that:

> "One of the complainants[']contentions, in all these proceedings, is that the absolute rate-break rule is an illegal proceeding, of itself, and in that respect all of these proceedings are similar."

10. 5 U.S.C. 1007(a).

11. M.A. at pp. 9-10.

12. M.A. at p. 10.

13. The three-judge court seemed to find some significance in this action also (J.St. App. A-4).

fied by Federal Civil Rule 15(b) as to judicial proceedings,[14] that failure to object to testimony treats any issue raised therein as if it were part of the pleadings. *United States* v. *Cushman,* 136 F.2d 815, 817 (9 Cir. 1943), *cert. denied* 320 U.S. 786; *Branding Iron Club* v. *Riggs,* 207 F.2d 720, 724 (10 Cir. 1953); cf. *Liverpool & London & Globe Ins. Co.* v. *Gunther,* 116 U.S. at 126-127 (decided under New York law). This is so even if at the trial leave to plead the issue is specifically denied, so long as no objection is raised when the evidence is submitted. *United States* v. *Cushman,* 136 F.2d 815 at 817 (9 Cir. 1943), *cert. denied* 320 U.S. 786; 3 MOORE, FEDERAL PRACTICE, ¶ 15.13. While appellees attempt to distinguish these cases (M.A., p. 20, note 25), contending that no "consent" was given here, the above decisions uniformly imply such consent where in testimony an issue is raised without objection.

Thus even if these complaints had not specifically requested the Commission to prescribe new rules in lieu of rate-break (and they did, as is shown in the I.C.C. Jurisdictional Statement in No. 752, at note 6 on p. 6), appellees' failure to object to the repeated requests for vacation of rate-break at the hearing placed the point squarely in issue under many settled decisions.

While appellees argue (M.A. at pp. 23-24) that carrier competition and rate-break rate rigidity were not properly in the case, and that "on proper notice it would have been the carriers' right to go into these subjects (*id.* at 24);" the fact is that throughout the hearing they made a full record

14. 3 MOORE, FEDERAL PRACTICE, ¶ 15.13; see *Nashua Savings Bank* v. *Anglo-American Co.,* 189 U.S. 221, 231.

on these issues,[15] and they requested no opportunity of the Commission after entry of the order in question to present any additional evidence as was their right.[16] Their failure to do so forecloses assertion of this afterthought, under well-settled decisions of this Court. *United States* v. *Tucker Truck Lines*, 344 U.S. 33 at 36-37; *United States* v. *Capital Transit Co.*, 338 U.S. 286 at 291.

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15. By their own witnesses appellees brought in much testimony on carrier competition (e.g. at R. 1026-1027, Ex. 123, pp. 2-3, Ex. 109, pp. 3-4) and through extensive cross-examination of shipper witnesses (e.g. at R. 1430-1462; R. 1469-1471), all of which testimony tended to show that shippers "received considerabl[y] more money for unloading trucks (R. 1026-27);" varying from 10-12¢ per bushel (R. 1428) to from 6-9¢ a bushel (R. 1429), depending upon markets. Likewise, the issue of whether rate-break rates were related to costs of service was first specifically injected into the case by appellees' own witnesses (R. 715-717; Ex. 70, pp. 2, 4-8 and 16; Ex. 71, pp. 2-5, 5-8, 8-10 and 10-12; Ex. 88, pp. 2-3, 4-5, 5-8 and 8-12).

16. Rule 101 of the Commission's General Rules of Practice (49 C.F.R. 1.101) permits petitions for further hearings or reconsideration in any case. In the petitions filed by these appellees they sought only reconsideration on the record as made, and at no time did they ask for rehearing on any point, or to introduce any evidence such as they suggest now to be appropriate.

3. CONCLUSION

Cutting through the clutter of appellees' assorted factual allegations, there remains for resolution one significant public law question. As we have shown (at J. St. pp. 8-14), in order to reverse the Commission here the district court was compelled to construe Section 4(a) of the Administrative Procedure Act contrary to its literal language, its legislative history, and all prior precedent.

Since this unprecedented ruling threatens to seriously impair the Commission's decisional function,[17] and could be applied across the board to hamper administrative agencies generally, these appeals should receive plenary consideration by the Court.

Respectfully submitted,

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January, 1966

17. The Commission so states at page 16 of its Jurisdictional Statement in No. 752.

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APPENDIX A.

I Transit Arrangements Which Complainants Requested the Commission to Establish in this Proceeding.

Primary Market Traffic on which Transit Balances Apply[1] (1)	Origin of Inbound Billing Producing Transit Balances on Traffic Shown in Col. (1)[2] (2)	Reference to Complaint or Exhibit in this Proceeding Demanding Transit Producing Transit Balances on Col. (1) Traffic Upon Submission of Inbound Billing From Col. (2) Origins (3)
1. Kansas City to St. Louis	Southern Nebraska points	Docket 33338, paras. VI (f), VI (g) and VI (l) as supplemented by complainants' Exhibit 22
2. Kansas City to St. Louis	Omaha	Docket 33338, para. VI (c) and Docket 33397, para. VI (f)
3. Sioux City to Chicago	South Dakota points	Exhibit 60, pp. 9-10 of Sioux City Market, Intervenor
4. Minneapolis to Chicago	Minnesota and South Dakota points south of C&NW line from Mankato, Minn. to Pierre, S. D.	Docket 33397, para. VI (b) and Docket 33469, para. VI (b)
5. Omaha to Chicago	Kansas City	Docket 33338, para. VI (d) and Docket 33397, para. VI (g)
6. Minneapolis to Chicago	Omaha	Docket 33397, para. VI (a) and Docket 33469, para. VI (a)
7. Omaha to Chicago	Sioux City	Docket 33338, para. VI (a)

	Primary Market Traffic on which Transit Balances Apply[1]	Origin of Inbound Billing Producing Transit Balances on Traffic Shown in Col. (1)[2]	Reference to Complaint or Exhibit in this Proceeding Demanding Transit Producing Transit Balances on Col. (1) Traffic Upon Submission of Inbound Billing From Col. (2) Origins
	(1)	(2)	(3)
8.	Kansas City to Arkansas points.	Iowa points	Docket 33338, para. VI (i)
9.	Kansas City to Texas points ...	Illinois points	Complainants' Exhibit 82
10.	Omaha to Peoria	Sioux City	Docket 33338, para. VI (a)
11.	Kansas City to St. Louis	Sioux City	Docket 33338, para. VI (b)
12.	Kansas City to Chicago	Omaha	Docket 33338, para. VI (c) and Docket 33397, para. VI (f)
13.	Kansas City to Peoria	Omaha	Docket 33338, para. VI (c) and Docket 33397, para. VI (f)
14.	Omaha to Peoria	Kansas City	Docket 33338, para. VI (d) and Docket 33397, para. VI (g)
15.	Omaha to St. Louis	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
16.	Omaha to Memphis	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
17.	Omaha to Arkansas points	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
18.	Omaha to Louisiana points	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)

	Primary Market Traffic on which Transit Balances Apply[1]	Origin of Inbound Billing Producing Transit Balances on Traffic Shown in Col. (1)[2]	Reference to Complaint or Exhibit in this Proceeding Demanding Transit Producing Transit Balances on Col. (1) Traffic Upon Submission of Inbound Billing From Col. (2) Origins
	(1)	(2)	(3)
19.	Omaha to Texas points	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
20.	Kansas City to St. Louis	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
21.	Kansas City to Memphis	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
22.	Kansas City to Arkansas points.	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
23.	Kansas City to Louisiana points	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
24.	Kansas City to Texas points ...	Minneapolis	Docket 33338, para. VI (e) and Docket 33397, para. VI (h)
25.	Kansas City to St. Louis	Iowa and Missouri points	Docket 33338, paras. VI (g) and VI (1)
26.	Kansas City to Missouri points.	Kansas points	Docket 33338, para. VI (h)
27.	Kansas City to Arkansas points	Minnesota and South Dakota points	Docket 33338, para. VI (i) as supplemented by Complainants' Exhibit 24

Primary Market Traffic on which Transit Balances Apply[1]	Origin of Inbound Billing Producing Transit Balances on Traffic Shown in Col. (1)[2]	Reference to Complaint or Exhibit in this Proceeding Demanding Transit Producing Transit Balances on Col. (1) Traffic Upon Submission of Inbound Billing From Col. (2) Origins
(1)	(2)	(3)
28. Kansas City to St. Louis	Texas points	Docket 33338, para. VI (j)
29. Kansas City to Omaha	Kansas and Colorado points	Docket 33338, para. VI (k)
30. Kansas City to Sioux City	Kansas and Colorado points	Docket 33338, para. VI (k)
31. Kansas City to Minneapolis	Kansas and Colorado points	Docket 33338, para. VI (k)
32. Kansas City to Memphis	Iowa and Missouri points	Docket 33338, para. VI (l)
33. Kansas City to Oklahoma points	Illinois points	Complainants' Exhibit 82
34. Minneapolis to Milwaukee ..... and other Lake Michigan gateways	Omaha and Sioux City	Docket 33397, para. VI (a) and Docket 33469, para. VI (a)
35. Minneapolis to St. Louis	Iowa, Minnesota and South Dakota points	Docket 33397, para. VI (b) and Docket 33469, para. VI (b)
36. Minneapolis to Duluth	North Dakota and South Dakota points	Docket 33397, para. VI (c) and Docket 33469, para. VI (c)
37. Minneapolis to Sioux City	Minnesota and South Dakota points	Docket 33397, para. VI (d) and Docket 33469, paras. VI (d) and VI (f)
38. Minneapolis to Omaha	Minnesota and South Dakota points	Docket 33397, para. VI (d) and Docket 33469, paras. VI (d) and VI (f)
39. Minneapolis to Kansas City	Minnesota and South Dakota origins	Docket 33397, para. VI (d) and Docket 33469, para. VI (d)
40. Minneapolis to St. Louis	Duluth	Docket 33397, para. VI (e) and Docket 33469, para. VI (e)
41. Kansas City to Eastern points..	Southwestern Iowa and Northwestern Missouri points	Docket 33397, para. VI (i)
42. Omaha to Kansas City	Colorado, Wyoming, Nebraska, Kansas and Iowa points	Docket 33171
43. Minneapolis to Chicago	Sioux City	Docket 33397, para. VI (a) and Docket 33469, para. VI (a)

[1] Where the destination is a gateway the transit balances would also apply to all traffic moving beyond to destinations to which the through rate is the gateway combination.

[2] The origins shown in this column are those appearing as origins on the waybills. Where a primary market appears in this column, transit balances will be established on movements described in Column 1 not only on submission of billing from the market shown here but also from origins from which the rates to the primary market shown in Column 1 are constructed as combinations over the market shown here. Thus, in item 2, for example, transit balances will be established on the Kansas City-St. Louis movement not only on submission of Omaha billing but on submission of billing from any point from which the rate to Kansas City is the Omaha combination.